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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

TIMOTHY LEWIS,

Defendant and Appellant.

B234344

(Los Angeles County
Super. Ct. No. TA115091)

APPEAL from a judgment of the Superior Court of Los Angeles County.
John J. Lonergan, Jr., Judge. Affirmed.

Kimberly Howland Meyer, under appointment by the Court of Appeal, for
Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney
General, Lance E. Winters, Assistant Attorney General, Linda C. Johnson and Blythe J.
Leszkay, Deputy Attorneys General, for Plaintiff and Respondent.

After defendant Timothy Lewis's first trial ended in a deadlocked jury, a second jury convicted him of carjacking in violation of Penal Code section 215, subdivision (a).¹ Defendant admitted a prior serious felony conviction pursuant to sections 1170, subdivisions (a) through (d); 667, subdivisions (b) through (i); and section 667, subdivision (a)(1). He also admitted having served a prior prison term pursuant to section 667.5, subdivision (b).

The trial court granted defendant's motion to dismiss the strike pursuant to *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497. The trial court sentenced defendant to a total of 10 years in state prison, consisting of the midterm of five years for the carjacking and five years pursuant to section 667, subdivision (a)(1).

Defendant appeals on the grounds that: (1) the trial court abused its discretion by prematurely giving the jury an unduly coercive supplemental instruction to break its deadlock, which was a violation of defendant's federal due process right to an impartial jury, and (2) the trial court's coercive supplemental instruction resulted in a miscarriage of justice requiring reversal of defendant's conviction.

FACTS

On October 17, 2010, Angel Guerrero stepped out of his truck after parking it. He left the engine running because he intended to make a short stop. Guerrero was aware that he had almost run into a white car while he was backing up to park. The white car stopped, and a group of five or six people including defendant got out and approached Guerrero while armed with hammers and metal rods. Guerrero believed they were going to attack him. Defendant, who Guerrero believed had a hammer, got in the driver's seat of Guerrero's truck and drove away.

¹ All further references to statutes are to the Penal Code unless stated otherwise.

Guerrero, his brother, and a young friend named Adriana Castro pursued the truck in the brother's car. Castro called 9-1-1. Castro's testimony corroborated that of Guerrero.

Guerrero's truck, with defendant at the wheel, was spotted by sheriff's deputies in a patrol car. When the officers made a U-turn in order to follow defendant, he drove away at a high rate of speed. The deputies did not pull out their weapons, although one deputy later testified he did not recall if he drew a gun. After a short chase, defendant crashed the truck into a fire hydrant. Defendant got out and ran but was eventually taken into custody.

Defendant testified that he alone approached Guerrero while unarmed after Guerrero hit the white car defendant was traveling in. Guerrero got a machete from his truck and held it, causing defendant to fear for his safety. Defendant got in Guerrero's truck and drove off in order to save himself. Defendant did not stop for the deputies because one of them pulled a gun on him when the patrol car first passed him. Defendant's testimony was supported by a friend who was in the white car with him and said that Guerrero pulled a machete on defendant. In November 2010, defendant's mother took photographs of the damage to the white car, and the photographs were shown to the jury.

DISCUSSION

I. Defendant's Argument

Defendant contends that, under the circumstances of this case, the trial court's reading of a deadlock-breaking instruction was unduly coercive and an abuse of discretion. Prior to the reading of the instruction, the jury had requested but not yet heard readback of the key prosecution witnesses' testimony and another hearing of the 9-1-1 call; therefore, the giving of the instruction was premature. These circumstances, combined with the fact that several jurors expressed difficulty with the length of the trial, lead to the conclusion that the instruction exerted pressure on minority jurors and the jury as a whole to return any verdict rather than none at all. The jury's independent judgment

was compromised, and defendant's due process right to an impartial jury was violated, requiring reversal.

II. Proceedings Below

Shortly before the noon recess on June 21, 2011, the jury was ordered to begin deliberations. The jury returned at 1:30 p.m. and deliberated until court adjourned at 4:00 p.m. that day. Before the jury left for the day, the trial court answered the jury's query on the term "force or fear" in a manner agreed upon by all parties.

Deliberations resumed at 9:00 a.m. on June 22, 2011. At approximately 9:30 a.m., the jury asked to listen to the 9-1-1 recording again as well as the testimony of Adriana Castro. The jury also asked, "Does his failure to substantiate 'necessity' [*sic*] imply guilt?" The parties agreed that the court would play the recording and provide the readback as soon as the court became available. With respect to necessity, the court referred the jury to the instructions on carjacking and necessity. Because defense counsel was engaged in a hearing for a different case, the readback and playback were delayed. Before the jury heard the readback, they buzzed the court again and issued a note saying, "we are not able to make a decision, nine to three."

The trial court announced that it intended to read the jury an instruction from *People v. Moore* (2002) 96 Cal.App.4th 1105 (*Moore*), and it provided copies to the prosecutor and defense counsel. The trial court stated its decision was "based on the length of the evidence and the gaps and the fact that they requested readback and the 9-1-1 tape being played." Later, the court stated for the record that it did not believe the jury had been deliberating long enough.

Defense counsel objected to the reading of the instruction. She requested the trial court to poll the jurors as to how many votes had been taken, remind them of the length of their deliberations and that they had requested readback and the 9-1-1- call, and ask them whether they felt that further deliberations would change anything. Defense counsel commented that the language of the instruction was "a little bit overbearing." The prosecutor had no objection. The trial court noted the objection by the defense and

stated it would read the instruction and inform the jury that at 1:45 that afternoon they would have the readback they requested.²

² The *Moore* instruction was read as follows: “Ladies and Gentlemen, what I am going to do right now is I have further instructions and directions to give you as to the count in this case. It has been my experience on more than one occasion that a jury which initially reported it was unable to reach a verdict was ultimately able to arrive at verdicts on one or more counts before it. To assist you in further deliberations, I’m going to further instruct you as follows. Your goal as jurors should be to reach a fair and impartial verdict if you are able to do so based solely on the evidence presented and without regard for the consequences of your verdict regardless of how long it takes to do so. It is your duty as jurors to carefully consider, weigh and evaluate all of the evidence presented at the trial, to discuss your views regarding the evidence and to listen to and consider the views of your fellow jurors. In the course of your further deliberations, you should not hesitate to re-examine your own views or to request your fellow jurors to re-examine theirs. You should not hesitate to change your view you once held if you are convinced it is wrong or to suggest other jurors change their views if you are convinced they are wrong. Fair and effective jury deliberations require a frank and forthright exchange of views. As I previously instructed you, each of you must decide the case for yourself and you should do so only after a full and complete consideration of all the evidence with your fellow jurors. It is your duty as jurors to deliberate with the goal of arriving at a verdict on the charge if you can do so without violence to your individual judgment. Both the People and the defendant are entitled to the individual judgment of each juror. As I previously instructed you, you have the absolute discretion to conduct your deliberations in any way you deem appropriate. May I suggest that since you have not been able to arrive at a verdict using the methods that you have chosen, that you consider to change the methods you have been following, at least temporarily and try new methods. For example, you may wish to consider having different jurors lead the discussions for a period of time or you may wish to experiment with reverse role playing by having those on one side of an issue present and argue the other side’s position an [*sic*] vice versa. This might enable you to better understand the other’s positions. By suggesting you should consider changes in your methods of deliberations, I want to stress I am not dictating or instructing you as to how to conduct your deliberations. I merely find you may find it productive to do whatever is necessary to ensure each juror has a full and fair opportunity to express his or her views and consider and understand the views of the other jurors. The integrity of a trial requires that all jurors at all times during the deliberations conduct themselves as required by these instructions. The decision the jury renders must be based on the facts and the law. You must determine what facts have been proved from the evidence received in the trial and not from any other source. A fact is something proved by the evidence or by stipulation. Second, you must apply the law I

After reading the *Moore* instruction, court recessed until 1:45 p.m. When the jury reassembled, the foreperson sent the trial court a written request for a readback of Guerrero's testimony as well.

At 2:00 p.m., the trial court played the 9-1-1 recording and then recessed for a short break. At that time, Juror No. 7 approached the bailiff to tell him he wanted to be excused for a "work hardship." The afternoon session continued with the requested readback. After court was adjourned for the day, Juror No. 7 addressed the court. A self-employed truck driver, he complained he was unable to service his accounts. He asked at what point he could claim a hardship. The court told him he would not be discharged, but if deliberations continued through the following afternoon, the court would address the issue again.

Juror No. 10 was also waiting to speak with the court at that time. She told the court that she had asked to speak to the court because of her concerns with her student research. She had since spoken with her professor who said it was "fine." The court informed her that if by the end of the following day she still had concerns, the court would address the issue again.

Alternate Juror No. 2 then informed the court that he or she had a prepaid airplane flight for Friday (the next day being Thursday). The court asked the juror to bring some

state to you to the facts as you determine them and in this way arrive at your verdict. You must accept and follow the law as I state it to you regardless of whether you agree with the law. If anything concerning the law said by the attorneys in their arguments or at any other time during the trial conflicts with my instructions on the law, you must follow my instructions. The decisions you make in this case must be based on the evidence received in the trial and the instructions given by the court. These are the matters this instruction requires you to discuss for the purpose of reaching a verdict. You should keep in mind the recommendations this instruction suggests when considering the additional instructions, comments and suggestions I have made in the instructions now presented to you. I hope my comments and [sic] suggestions may have been of some assistance to you. You're ordered to continue your deliberations at this time. If you have other questions, concerns, requests or any communications you desire to report to me, please put those in writing on the form my bailiff has provided you with. Have them signed and dated by your foreperson and then please notify the bailiff."

kind of verification and stated that, if there was an issue at the end of Thursday's session, the court would take it up again. Neither the prosecutor nor defense counsel had any comments on the court's discussions with the jurors.

On the following morning, the court announced that Juror No. 5 had telephoned to say he was unable to come to court because he had paralysis on one side. The court noted it had already made special accommodations for this juror due to his physical ailments and age. The trial court telephoned the juror by means of a speaker phone in the presence of counsel. The juror reported stiffness and difficulty in walking and said he needed to go to physical therapy that day, since he had missed several therapy appointments due to jury service. When asked if he had been able to listen and deliberate despite his condition, the juror replied that he had. The court asked the juror to postpone his therapy until the afternoon and to come to court. The juror agreed. Defense counsel was in agreement that the juror should be made to come to court.

The record shows that the jurors resumed their deliberations at 10:15 a.m. At approximately 10:35, the jury reached its guilty verdict.

III. Relevant Authority

“[I]t is error for a trial court to give an instruction which either (1) encourages jurors to consider the numerical division or preponderance of opinion of the jury in forming or reexamining their views on the issues before them; or (2) states or implies that if the jury fails to agree the case will necessarily be retried. [Fn. omitted.]” (*People v. Gainer* (1977) 19 Cal.3d 835, 852 (*Gainer*), disapproved on another point in *People v. Valdez* (2012) 55 Cal.4th 82, 163.) *Gainer* disapproved of the so-called “‘Allen charge’”—approved by the United States Supreme Court in *Allen v. United States* (1896) 164 U.S. 492, 501-502—which was used as a means of “‘blasting’ a verdict out of a deadlocked jury.” (*Gainer*, at p. 844.)

“The court may ask jurors to continue deliberating where, in the exercise of its discretion, it finds a ‘reasonable probability’ of agreement. [Citations.]” (*People v. Pride* (1992) 3 Cal.4th 195, 265, quoting § 1140.) “‘Although the court must take care to

exercise its power without coercing the jury into abdicating its independent judgment in favor of considerations of compromise and expediency [citation], the court may direct further deliberations upon its reasonable conclusion that such direction would be perceived ““as a means of enabling the jurors to enhance their understanding of the case rather than as mere pressure to reach a verdict on the basis of matters already discussed and considered.””” (*People v. Bell* (2007) 40 Cal.4th 582, 616.) “The question of coercion is necessarily dependent on the facts and circumstances of each case. [Citation.]” (*People v. Sandoval* (1992) 4 Cal.4th 155, 196; *People v. Pride*, *supra*, 3 Cal.4th at p. 265; *People v. Breaux* (1991) 1 Cal.4th 281, 319.)

IV. No Abuse of Discretion

In *Moore*, the appellate court upheld the trial court’s giving of the instruction at issue here when the jury stated it could not reach a verdict after one day of deliberations. (*Moore*, *supra*, 96 Cal.App.4th at p. 1118.) The court rejected the same arguments appellant makes here—that the instructions were coercive and improper—and instead commended the trial court “for fashioning such an excellent instruction.” (*Id.* at pp. 1120, 1122.) The court also concluded that the supplemental instructions did not violate the rule set forth in *Gainer*. (*Moore*, at p. 1121.) The same instruction given in *Moore* has been cited with approval in *People v. Hinton* (2004) 121 Cal.App.4th 655, 661, and *People v. Whaley* (2007) 152 Cal.App.4th 968, 981-985.

We do not believe the trial court’s reading of the *Moore* instruction in this case was coercive under the circumstances. As noted, the instruction has been generally approved. The trial court’s instruction here was nearly identical to the *Moore* instruction. (*Moore*, *supra*, 96 Cal.App.4th at pp. 1118-1119.) As in *Moore*, the trial court here instructed the jury that its goal was ““to reach a fair and impartial verdict if you are able to do so based solely on the evidence presented and without regard for the consequences of your verdict [or] regardless of how long it takes to do so.”” (*Id.* at p. 1118.) The trial court “instructed that it was their duty as jurors to deliberate with the goal of arriving at a verdict on the charge ‘if you can do so without violence to your individual judgment.’

[Citation.]” (*Id.* at p. 1119.) The trial court never directed the jury that it must reach a verdict but stated that it was each juror’s responsibility to weigh and consider all the evidence presented at trial. (*Id.* at p. 1118.) And again as in *Moore*, the instruction “simply reminded the jurors of their duty to attempt to reach an accommodation.” (*Id.* at p. 1121.)

In the instant case, the instruction was read immediately after the jury told the court it was “not able to make a decision.” The jury had not deliberated for very long at that point (a generous estimate is five hours), and had not even heard the readback and playback it had requested that same morning. It would appear that these jury members were in need of more guidance than had been provided in the standard jury instructions the trial court gave them read prior to the start of deliberations. The *Moore* instruction would have helped the jurors establish a rational and sober basis for decision-making that they could employ during and after the re-reading of the testimony and the re-playing of Castro’s 9-1-1 call. The fact that the jurors announced an inability to reach a decision before hearing their requested readback is indicative of a disorganized and impetuous approach.

One of the circumstances that defendant cites as determinative in this case is the fact that several jurors were “vulnerable” in that they expressed concerns over the potential length of the deliberations. With respect to Juror No. 10, her concerns were resolved before she even spoke to the trial court. Alternate Juror No. 2 had a prepaid plane ticket for Friday, but, without prompting, expressed an ability to rejoin deliberations on the following Monday, should they continue. Juror No. 7 explained that he had been concerned about his business since he first arrived at the jury selection room, and he was reassured by the trial court that his concerns would be revisited at the end of the following day. Juror No. 5 apparently did not appreciate the seriousness of his absence and readily agreed to come to court that day after speaking with the trial court. We do not agree with defendant that the concerns of these jurors, who were clearly

reassured that their concerns would be addressed and who never actually requested to be excused, made the jury as a whole vulnerable to coercion.

Likewise, defendant cites the short time the jury spent deliberating after Juror No. 5 joined the rest of the jury as an indication that the minority jurors were improperly pressured. According to defendant, it is “apparent that the admonition effectively coerced the jury as a whole to return a verdict on the basis of matters it had already discussed and considered for the sake of expediency.” Although it is true that the jury had already discussed the evidence, it is also true that the jury requested a playback of the 9-1-1 tape, and they requested readback both before and after the *Moore* instruction was read to them. Having listened to the readback and the 9-1-1 call, the jury members refreshed their respective memories as to the testimony. The jury’s query as to defendant’s “failure” to establish the defense of necessity suggests that the jury members had doubts as to defendant’s credibility. Given these circumstances, we do not believe the short period of time of the final deliberation session proves that the jury was coerced. In similar circumstances, the *Moore* court stated that, “presumably because of the relatively brief duration of deliberations conducted by the jurors before they announced they could not reach a verdict on count 1, the trial court concluded further deliberations might be beneficial without questioning the jury regarding the impasse. The fact the jury was able to reach a verdict relatively quickly after being further instructed reflects the court properly exercised its discretion.” (*Moore, supra*, 96 Cal.App.4th at p. 1122.) We believe the same occurred in this case.

Finally, defendant points out the separate concurring opinion of Justice McAdams in *People v. Whaley* and contends that the justice’s concerns are especially relevant here. Although Justice McAdams agreed that reversal was not required in that case (*People v. Whaley, supra*, 152 Cal.App.4th at p. 985 [conc. opn. of McAdams, J.]), he commented, “I am troubled by the statement to the jurors that they should consider using ‘reverse role playing’ as a method of deliberation, especially in a case such as this one where the trial court was aware at the time of the instruction that the numerical breakdown of the

deadlocked jury was 11 to one. Furthermore, I have concerns about language found in the early and later portions of the instruction that creates the impression that the court has the expectation that the jurors should come to a verdict, the statement shortly thereafter that they have a ‘goal as jurors’ to reach a verdict if they are able to do so ‘regardless of how long it takes,’ and the concluding charge that the panel is ‘ordered to continue your deliberations.’ These remarks are a far cry from the restrained, neutral tone of CALCRIM No. 3550. [Citation.] [¶] I disagree with the view that such statements cannot be found to be unduly coercive because they are mere ‘suggestions’ made by the court. These comments are more than friendly and helpful advice. The trial judge is seen by the jury as the central courtroom authority figure, the unbiased source of the law and the same person who previously instructed them . . . that ‘[y]ou must follow the law as I explain it to you, even if you disagree with it.’ Thus the need for utmost caution.”

At the outset, Justice McAdams’s concurrence merely expresses a need for caution, especially since the jury was deadlocked 11 to one. We do not believe the trial court here displayed a lack of caution, and there was no single minority juror. Secondly, the concurring opinion is not citable authority. Finally, even if Justice McAdams’s belief that a jury might regard the court’s suggestions as something more forceful than advice could be substantiated, any methods suggested by the instruction applied to both minority and majority jurors and were intended to help both sides understand the other’s view. Minority jurors were not singled out. (Cf. *Gainer*, *supra*, 19 Cal.3d at p. 850.) That a juror’s mind might be changed does not signify that he or she was coerced. Persuasion is not synonymous with coercion.

In sum, we see nothing coercive about the court’s *Moore* instruction to the jury. The challenged instruction did not violate the *Gainer* rule. It did not put pressure on minority jurors to agree with the majority opinion or suggest that failure to reach a verdict would necessarily result in a retrial. (See *Gainer*, *supra*, 19 Cal.3d at pp. 850-851.) Rather, the instruction told each juror to “decide the case for yourself” and to “deliberate with the goal of arriving at a verdict on the charges” only if he or she could do

so “without [doing] violence to [his or her] individual judgment.” The instruction recognized the possibility that the jury may not reach a verdict. This is nothing more than what is always required of the jurors. The trial court did not abuse its discretion, and no due process violation or miscarriage of justice occurred.

DISPOSITION

The judgment is affirmed.

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_____, P. J.
BOREN

We concur:

_____, J.
ASHMANN-GERST

_____, J.
CHAVEZ